

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

URS CORPORATION, a Nevada
corporation,

Plaintiff,

v.

TRANSPO GROUP, INC., a Washington
corporation,

Defendant.

CASE NO. C14-00860 RSM

BENCH ORDER, FINDINGS OF FACT,
AND CONCLUSIONS OF LAW

I. INTRODUCTION

In this action, Plaintiff, URS Corporation (hereinafter “URS”), has brought claims for Breach of Contract, Negligence and Indemnity against Defendant Transpo Group, Inc. (hereinafter “Transpo”). Dkt. #3. Transpo also brought a Counterclaim against URS seeking a declaration of the rights and legal relations between Transpo Group with respect to responsibility for costs associated with the need to accommodate forward compatibility requirements on the I-405 N.E. 6th to I-5 Widening and Express Toll Lanes Design-Build Project. Dkt. #6. However, prior to trial in this matter, the Court granted Plaintiff’s Motion for Judgment on the Pleadings, dismissing Transpo’s Counterclaim as duplicative of its affirmative defenses and concluding it therefore has no useful purpose in this litigation. Dkt. #17. Also prior to trial, the Court determined that the Teaming Agreement provisions survive and may be

1 applicable to the instant dispute because the Agreement does not cover the same subject matter
2 as the Master Subcontractor Agreement, and that the limitation on liability precluding the
3 recovery of consequential and indirect damages between the parties “flows down” from the
4 agreement between Flatiron and URS to the agreement between URS and Transpo. Dkt. #28.

5 Between June 1 and June 9, 2015, the Court conducted a bench trial in this matter. Both
6 parties presented lay and expert witnesses, as well as numerous documentary exhibits.
7 Following the bench trial, the parties submitted proposed Findings of Fact and Conclusions of
8 Law. Dkts. #52 and #53.

9 Having considered the pleadings, trial briefs, sworn testimony of witnesses, and
10 exhibits, the Court now FINDS AND CONCLUDES that URS has failed to meet its burden of
11 proving by a preponderance of the evidence that Transpo is responsible for the error at issue in
12 this action, and makes the following Findings of Fact and Conclusions of Law.
13

14 **II. FACTS STIPULATED BY THE PARTIES¹**

- 15 1. This dispute arises out of a design-build construction project known as the I-405 NE
16 6th to I-5 Widening and Express Toll Lanes Design-Build Project to widen and add
17 toll lanes to a segment of I-405 from Bellevue to Lynnwood (“the Project”), located
18 in King and Snohomish Counties, Washington.
19
- 20 2. The design-builder for the Project is Flatiron Constructors, Inc. (“Flatiron”) who is
21 not a party to this action.
22
- 23 3. The owner of the Project is the Washington State Department of Transportation
24 (“WSDOT”) which is also not a party to this action.
25
- 26 4. URS, as designer, and Flatiron, as contractor, entered into a “Contractor/Designer
27 Teaming Agreement.” Under the Agreement, Flatiron and URS agreed to
28

¹ See Pretrial Order at Dkt. #37.

1 exclusively work together to assemble a design/build team to respond to a Request
2 for Proposal (“RFP”) to be published by WSDOT. The Agreement designated URS
3 as lead designer for the RFP response. URS’s responsibilities included reviewing
4 and analyzing owner materials and preparing preliminary designs sufficient to allow
5 for the development of quantity and cost estimates. URS subcontracted portions of
6 its design responsibilities to Transpo and others.
7

8 5. On July 21, 2011, the Flatiron Design-Build Team was short-listed as a qualified
9 proposer for the Project by WSDOT.

10 6. On July 25, 2011, WSDOT released the Project Request for Proposals (RFP).
11 Section 2.19 entitled “Signing” described the permanent signing requirements for
12 the Project.
13

14 7. The RFP contained the following definition of “Forward Compatible” – “*Project*
15 *elements that are constructed so they can be integrated into the Forward*
16 *Compatibility Plans provided in Appendix M2 of the Technical Requirements,*
17 *without significant demolition or significant reconstruction of the elements. The*
18 *Design-Builder shall demonstrate, with engineering plans and calculations, how the*
19 *Project elements can be integrated into the Forward Compatibility Plans, including*
20 *a discussion of how changes may impact future freeway operations and*
21 *constructability.” The RFP also contained the following explanation of “Forward*
22 *Compatibility Plans”:*
23
24

25 **Forward Compatibility Plans** – The Forward Compatibility
26 Plans modify the existing condition by adding lanes in each
27 direction on I-405. The Forward Compatibility Plans also add
28 auxiliary lanes, improve interchanges in selected locations, and
install an Active Traffic Management system. Although the
Forward Compatibility Plans are not funded at this time, it is

1 anticipated that the Project and each future project will include
2 elements that are compatible with them.

3 8. URS and Transpo signed a Teaming Agreement effective August 29, 2011, and
4 agreed to work with one another during the proposal phase of Project work. URS, as
5 “Prime Consultant,” was to “*prepare those portions of the proposal relating to and*
6 *perform the work entailed in, matters described in Exhibit B, subject to the*
7 *assignment of such additional responsibility by mutual agreement between Team*
8 *Members from time to time.*” Transpo’s scope of work under the Teaming
9 Agreement was identified in Exhibit B to the Teaming Agreement. Transpo was
10 identified as the “lead” for “*MOT [maintenance of*
11 *traffic]/staging/signal/signing/stripping.*” Transpo’s work related to MOT, staging,
12 signal and striping is not at issue in this litigation.
13

14 9. In August of 2011, Flatiron established a Task Force to review and evaluate
15 WSDOT’s RFP in preparation for submission of a response to the RFP.
16

17 10. On October 21-22, 2011, representatives of design team members and
18 subcontractors participated in “Estimating Workshops” for the Flatiron proposal. At
19 the workshops assignments were made among design team members to begin
20 developing information for use by Flatiron and its subcontractors in pricing the
21 construction work contained in the proposal. After the workshops, a spreadsheet of
22 “Summary Action Items” was distributed by Flatiron to the participants. The
23 spreadsheet contains an action item for Transpo’s traffic engineers Merrill and
24 Binder stating: “*create sign structure matrix including, cantilever, bridge and*
25 *tolling structures, provide type, station and location in x-section.*” The spreadsheet
26 contains an action item for URS’s roadway engineers Mudayankavil and Hansen
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1 stating: “*After creating sign structure matrix, cut x-sections at specific locations,*
2 *evaluate for feasibility.*” The spreadsheet contains an action item stating: “*Develop*
3 *basic design parameters for sign bridges (lengths, leg heights and location in cross*
4 *section) and draw into xsections,*” no person was identified as responsible for this
5 action item.
6

7 11. On October 27, 2011, Mr. Binder forwarded to Hansen and Mudayankavil a partial
8 signage matrix, which listed the stations of all the signs Transpo had identified as
9 required on the Project. Binder requested in his October 27, 2011 email that Hansen
10 and Mudayankavil provide him with cross-sections along the roadway at stations
11 Transpo had identified. Binder stated: “*We are going through and populating the*
12 *rest of the spreadsheet now for foundation types, and, based on your [URS’s] cross-*
13 *sections, [we] will estimate structure length and elevations.*”
14

15 12. On October 28, 2011, Mr. Hansen of URS “cut” and forwarded cross-sections to
16 Mr. Binder at Transpo, copying Mr. Mudayankavil at URS. Hansen stated in his
17 email: “*Attached are the cross-sections cut for the sign structures.*”
18

19 13. On November 3, 2011, WSDOT issued Addendum No. 16 to the RFP. Addendum
20 No. 16 added language to Section 2.19.4.1.1 of the RFP requiring that “*all overhead*
21 *sign structures shall be forward compatible if shown on the Forward Compatibility*
22 *Plans (Appendix M2).*”
23

24 14. On November 7, 2011, Transpo’s Merrill emailed three file attachments relating to
25 “I-405 Sign Structures (RFI 31)” to Hart Crowser, KPFF and URS.

26 15. URS provided additional cross-sections requested by Transpo on November 8,
27 2011, November 11, 2011 and November 14, 2011.
28

1 16. Flatiron delivered its bid proposal to WSDOT on December 19, 2011. On January 6,
2 2012, WSDOT revealed bid results; the Flatiron Design-Build Team was the
3 successful bidder.

4 17. On January 25, 2012, Flatiron and URS entered into a Standard Subcontract for
5 Design Services. The Standard Subcontract for Design Services bears an effective
6 date of August 15, 2011.

7
8 18. On February 28, 2012, URS and Transpo entered into a Master Subcontract for
9 Services. The Master Subcontract bears an “effective date” of October 24, 2011.

10 19. Transpo’s scope of work under the Post-Award phase of the Project was defined in a
11 Work Order entered on March 8, 2012 with URS. Pursuant to URS/Transpo Work
12 Order # 267372, Transpo agreed to “*provide all professional supervisory and*
13 *technical personnel, services, equipment, materials and supplies necessary to*
14 *prepare and provide the traffic, signal, signing, pavement marking and MOT design*
15 *for the Project.*” Signing design submittals were identified as “*Preliminary Design*
16 *Submittal (2.19.5.1)*” and “*Permanent Signing Plans (Final Design Submittal)*
17 *(2.19.5.2).*” Transpo’s “Assumptions” stated “Geotechnical work and foundation
18 design to be provided by others;” and “Structural design, including structural design
19 of sign gantries, to be provided by others.”

20
21
22 20. In the spring of 2013, the design team discovered that eight overhead sign structures
23 that had been released for construction were not forward compatible.

24
25 21. On March 28, 2013, the design team issued a Field Design Change/Notice of Design
26 Change indicating that eight sign structure designs that had been released as “Ready
27 for Construction” were being re-designated as “Not for Construction Design.”
28

1 22. Flatiron asserted a claim against URS as a result of the failure of certain sign
2 structures to meet Forward Compatibility requirements contained in the Project
3 Contract Documents.

4 23. URS has tendered Flatiron's claim to Transpo and Transpo has refused to accept full
5 responsibility for the claim. URS has withheld payments from Transpo.
6

7 **III. CREDIBILITY OF THE WITNESSES**

8 The following fact witnesses testified at trial: Mindy Steckmest, Garth Merrill, Shane
9 Binder, Jacob Fullington, Erik Hansen, Jeremy Chin and Paul Mayo. The Court finds that all
10 of these witnesses were credible. Their answers during testimony were complete and appeared
11 to be honest, and their demeanor and behavior on the witness stand leads the Court to conclude
12 that they were truthful, credible witnesses. *See Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th
13 Cir. 1999) ("We give 'special deference' to a credibility determination that is based on
14 demeanor.").

15
16 Weight is given to the [] judge's determinations of credibility for the
17 obvious reason that he or she "sees the witness and hears them testify, while
18 the Board and the reviewing court look only to cold records." All aspects of
19 the witness's demeanor – including the expression of his countenance, how
20 he sits or stands, whether he is inordinately nervous, his coloration during
21 critical examination, the modulation or pace of his speech and other non-
22 verbal communication – may convince the observing trial judge that the
23 witness is testifying truthfully or falsely. The same very important factors,
24 however, are entirely unavailable to a reader of the transcript. . . .

25 *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 818 (9th Cir. 1994). Further, all of these witnesses
26 were knowledgeable and provided testimony that was helpful to the Court. They all answered
27 questions candidly on both direct and cross-examination.
28

Three expert witnesses also testified: Peter De Bolt and Mark Keller on behalf of
Defendant, and Carl Zietz on behalf of Plaintiff. While the Court found these three witnesses

1 to be credible, the Court gave more weight to the testimony of Peter De Bolt and Mark Keller
 2 than to Carl Zietz. The Court found Mr. Zietz to be more evasive in his answers and sometimes
 3 non-responsive. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560
 4 (1979) (noting that it is the responsibility of the trial of fact “to resolve conflicts in the
 5 testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to
 6 ultimate facts”); *Brennan v. Elmer’s Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975) (“The
 7 credibility of witnesses is best determined by the judge at trial.”). The Court also took into
 8 consideration that these experts were retained by counsel and paid for their services and
 9 weighed their testimony accordingly.
 10

11 IV. ADDITIONAL FINDINGS OF FACT

12
 13 Having carefully considered the testimony of the witnesses called at trial, thoroughly
 14 reviewed the exhibits admitted into evidence, and considered the parties’ arguments, the Court
 15 makes and enters the following additional Findings of Fact (adopted from Defendant’s
 16 Proposed Findings of Fact) pursuant to Federal Rule of Civil Procedure 52(a).² All Findings of
 17 Fact referred to herein, unless otherwise qualified or limited, apply the preponderance of the
 18 evidence standard.³
 19

20
 21 ² When a District Court adopts one party’s proposed findings of fact and conclusions of law,
 22 the Ninth Circuit will review the District Court’s Order “with special scrutiny.” *Silver v. Exec.*
 23 *Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006). However, the
 24 Ninth Circuit Court of Appeals has acknowledged that the District Court is entitled to make
 25 such an adoption. *Withrow v. Bache Halsey Stuart Shield*, 2015 U.S. App. LEXIS 10195 (9th
 26 Cir. 2015); *Barnett v. Sea Land Serv., Inc.*, 875 F.2d 741, 745 (9th Cir. 1989); *Anderson v. City*
 27 *of Bessemer*, 470 U.S. 564, 572 (1985).

28 ³ The Court notes that neither party ordered the trial transcripts in this matter before submitting
 their proposed Findings of Fact, nor has either party cited to specific testimony in the record in
 support of their Proposed Findings. However, having reviewed Transpo’s Proposed Findings
 of Fact, along with the admitted exhibits and the Court’s extensive notes of the testimony taken
 during trial, the Court finds Transpo’s Proposed Findings of Fact consistent with, and
 supported by, the evidence (both testimonial and documentary) submitted during trial.

A. Professional Services Contracts

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2 1. The professional services agreements entered between the parties are identified
3 as the “Teaming Agreement” and the “Master Subcontract for Services.” The Teaming
4 Agreement governed the parties’ relationship during the proposal phase before WSDOT
5 contract award. The Master Subcontract Agreement governed the parties’ relationship after
6 contract award. The scope of services incorporated into the Master Subcontract Agreement
7 informs the scope of services in the Teaming Agreement.
8

9 2. Transpo’s scope of services under the Teaming Agreement and the Master
10 Subcontract for Services (“the Agreements”) with respect to “signing” was to design the sign
11 panels, including sizing, messaging and colors of the panels; locate the panels above the
12 appropriate lanes; and determine the proper stationing of the panels along the roadway
13 alignment. Stationing of the sign panels involved locating the sign panels at proper intervals
14 along the roadway so that the panels were viewable by vehicles on the roadway sufficiently in
15 advance to allow drivers to react to the information contained in the panels.
16

17 3. Plaintiff did not show by a preponderance of the evidence that Transpo’s scope
18 of services under the Agreements included designing sign structures or dimensioning sign
19 structures. It is not clear by a preponderance of the evidence that Transpo was responsible for
20 designing sign structure foundations or locating sign structure foundations. The evidence did
21 not support a finding that Transpo was required to design all of the items identified in §2.19 of
22 the RFP.
23
24

B. Proposal Phase Facts

25
26 1. On September 1, 2011, Transpo engineer Shane Binder communicated to URS
27 and Flatiron Transpo’s understanding that the RFP required sign panels be placed at intervals
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1 consistent with WSDOT's forward compatibility ATM Conceptual Plans. Mr. Binder asked
2 that WSDOT be questioned to confirm it was not WSDOT's intent that the sign panels be
3 placed at intervals consistent with WSDOT's Master Plan. The issue raised by Transpo related
4 to the stationing of the sign panels along the roadway, not the length of the sign structures, and
5 was unrelated to the requirement subsequently added by WSDOT to the RFP that certain sign
6 structures be designed and built to be compatible with future roadway lanes shown in
7 WSDOT's Master Plan. There is no evidence Flatiron posed the question to WSDOT.
8

9 2. Transpo's signing deliverables were completed and made available for
10 subcontractors' use for estimating on or about September 28, 2011.
11

12 3. In October of 2011, Flatiron established a Task Force to review and evaluate
13 WSDOT's RFP in preparation for submission of a bid. Mindy Steckmest of URS, Thomas
14 Mudayankavil of URS and Sean Battle of KPFF were designated "Forward Compatibility
15 Lead." Their responsibilities included reviewing WSDOT's RFP to determine how the Flatiron
16 team could meet and exceed WSDOT's forward compatibility requirements. The assignment
17 should have instilled in these individuals a heightened awareness of forward compatibility
18 requirements.
19

20 4. During mid-to-late October of 2011, URS roadway engineers and KPFF
21 structural engineers were involved in discussions regarding forward compatibility issues related
22 to other structures such as retaining walls and bridges to be constructed as a part of the Project.
23 Section 2.13 of the RFP described the bridges and other structures required to be designed and
24 built for the Project. Sign structures were included within the scope of the section. Section
25 2.13.4.2.18 identified some requirements for sign structures and indicated additional sign
26 structure requirements were contained in §2.19, the signing section of the RFP. The RFP
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1 required that a number of bridges, retaining walls and other structures be designed and
2 constructed to be forward compatible to accommodate planned future roadway expansion.
3 Section 2.11.4.1 identified forward compatibility as “Mandatory Design Criteria.” The section
4 referenced roadside barriers, drainage inlets, drainage trunk lines and walls as items required to
5 be forward compatible. Section 2.13.1.1 required the SR 522 braided ramp bridge be forward
6 compatible. As a result of these requirements, URS and KPFF had significant exposure to
7 WSDOT’s forward compatibility requirements. Plaintiff did not prove by a preponderance of
8 the evidence that Transpo had any exposure to, or responsibility to account for, roadway
9 expansion forward compatibility requirements.
10

11 5. On October 20 and 21, 2011, URS, Transpo, other consultants including Hart
12 Crowser (the consultant responsible for sign foundation design), and KPFF (the consultant
13 responsible for sign structure design during the proposal phase), along with Flatiron and some
14 of its subcontractors, participated in estimating workshops. The goal of the workshops was to
15 develop information to assist in further refinement of subcontractor cost estimates.
16

17 6. Transpo’s signing deliverables submitted in late September identified the
18 number and type of structures (cantilever or bridge) required to hold the signs identified by
19 Transpo. The contractor estimating the cost of the sign structures asked for additional
20 information regarding the sizes of sign structures. At the workshops Mr. Merrill and Mr.
21 Binder were assigned the task of providing URS a sign structure matrix identifying the sign
22 structures required by the RFP and providing the type, station and location within a cross-
23 section of each sign structure. After the matrix was created, URS roadway engineers Mr.
24 Mudayankavil and Mr. Hansen were to cut cross-sections at specific locations and evaluate the
25 feasibility of placing sign structures at the locations shown in the cross-sections. The
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1 evaluation by URS was to include a determination of whether there were any direct, physical
2 conflicts between the placement of sign structures in the cross-sections and retaining walls,
3 structures, etc. To perform the feasibility evaluation URS would need to determine whether or
4 not the sign structures were required to span future roadway lanes. There is no evidence in the
5 record that, at the workshops, anyone was assigned responsibility for estimating basic design
6 parameters (length, leg heights and location in cross-section) of the sign structures once the
7 cross-sections were cut.
8

9 7. On October 27, 2011, Mr. Binder of Transpo forwarded to URS's roadway
10 engineers a partial signage matrix, which listed the stations of all the signs Transpo had
11 identified as required on the Project. Mr. Binder volunteered to develop the necessary
12 information to populate the rest of the table based upon data contained in the cross-sections to
13 be provided by URS. The information Transpo offered to develop was estimates of structure
14 lengths and elevations.
15

16 8. Signing engineers typically do not determine the dimensions of sign structures.
17 The typical process of locating sign structures is a coordinated effort between a signing
18 engineer, a roadway engineer and a structural engineer. The signing engineer typically
19 determines the stations along the roadway at which signs are required; the roadway engineer
20 determines the width of the roadway or planned future roadways required to be spanned by the
21 sign structures necessary to hold the signs; and the structural engineer dimensions the
22 structures.
23
24

25 9. On October 28, 2011, URS roadway engineers Mr. Mudayankavil and Mr.
26 Hansen forwarded cross-sections to Transpo with the understanding Transpo would use the
27 data in the cross-sections to estimate sign structure lengths and elevations. The cross-sections
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1 were “cut” from electronic data provided by WSDOT. The cross-sections provided by URS to
2 Transpo did not incorporate points showing WSDOT’s future roadway limits. As of
3 October 28, 2011, the RFP did not specifically require sign structures to be forward compatible
4 with future planned roadway limits.

5 10. Transpo utilized edge of pavement and/or edge of traveled way information in
6 the cross-sections provided by URS to sketch into the cross-sections rough depictions of sign
7 structures. The cross-sections showed the edge of pavement to be constructed as a part of the
8 I-405 BTL project, but not the edge of pavement shown in WSDOT’s forward compatibility
9 Master Plan. Transpo utilized the rough depictions of sign structures to estimate the length of
10 sign structure horizontal members, which it calculated based upon the URS cross-sections and
11 applicable clear zone requirements, and inserted the information into the sign structure matrix.
12 Transpo understood the estimates would be utilized for the purpose of estimating sign structure
13 fabrication costs.

14 11. The cross-sections provided to Transpo by URS were a byproduct of URS’s
15 efforts to create a three-dimensional digital terrain model for estimating and design purposes.
16 Digital terrain modeling is a function performed by roadway engineers. Signing engineers do
17 not perform 3D modeling and none of the Transpo engineers involved in the project were
18 proficient in utilizing the InRoads 3D modeling program; it is a program used by roadway
19 engineers. It is a typical practice, and a good practice, for roadway engineers developing a
20 digital terrain model on WSDOT projects containing forward compatibility requirements to
21 include in their digital terrain model a “grey line” or “ghost line” identifying the bounds of
22 WSDOT’s Master Plan future roadway limits. The forward compatibility ghost line is valuable
23 information for all design team members to use in verifying compliance with forward
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1 compatibility requirements. URS did not include a ghost line showing forward compatibility
2 roadway limits in its digital terrain model.

3 12. On November 3, 2011, WSDOT issued Addendum No. 16 to its RFP.
4 Addendum No. 16 required, among other things, that certain sign structures be forward
5 compatible with future roadway expansion plans.

6
7 13. Under the Teaming Agreement URS assumed responsibility for coordinating all
8 contacts with WSDOT and keeping Transpo informed of guidance and directions from
9 WSDOT that impacted Transpo's performance of its work. Addenda were a key tool utilized
10 by WSDOT to communicate direction and guidance to parties working to respond to the RFP.
11 It is impractical and inefficient for each subconsultant to individually review every addendum.
12 URS undertook on occasions prior to the issuance of Addendum 16 to advise Transpo and other
13 subconsultants of addenda issued by WSDOT and to highlight key services impacted by the
14 addenda. The last addendum brought to the attention of Transpo and other subconsultants was
15 Addendum 15. While it appears that Addendum 16 was posted to Sharepoint, which was
16 accessible by all of the subcontractors on the Project, no evidence was presented that showed
17 URS brought to Transpo's attention the fact that Addendum 16 required certain sign structures
18 be designed and constructed to accommodate future forward compatibility roadway limits.
19
20

21 14. URS continued to provide Transpo cross-sections after Addendum No. 16 was
22 issued without modifying the cross-sections to account for the new forward compatibility future
23 roadway expansion requirement contained in Addendum 16.
24

25 15. On November 7, 2011, Merrill of Transpo forwarded cross-sections with sign
26 structures sketched in and the spreadsheet with estimated sign structure lengths and elevations
27 to design team members Hart Crowser, KPFF and URS. At the October Estimating Workshop
28

1 KPFF's Mr. Erickson and Hart Crowser's Mr. Chen were assigned responsibility for utilizing
2 the length and elevation information to select foundation types for the sign structures.

3 16. On November 14, 2011, Mr. Erickson of KPFF uploaded the sign structure
4 matrix to the Flatiron team's SharePoint website, making the information available to
5 subcontractors for estimating sign structure costs. Information about foundation shaft
6 requirements was added to the spreadsheet between the time Transpo sent the spreadsheet to
7 the design team and the time KPFF published the spreadsheet to SharePoint.
8

9 17. URS and Flatiron focused their attentions during the proposal phase on
10 expensive components of the project that they considered "cost drivers." The sign structures
11 were not considered cost drivers. URS and Flatiron also did not focus their attention on
12 forward compatibility requirements applicable to sign structures. Flatiron's subcontractor,
13 Rainier Welding, based its sign structure cost estimate on approximate sign bridge length
14 ranges rather than a precise length for each sign structure.
15

16 18. On November 8, 2011, Erik Shimizu of DKS Associates emailed Transpo, URS
17 and several contractors regarding impacts of Addendum 16 on elements of the Intelligent
18 Traffic System (ITS) DKS was designing. Mr. Shimizu asked that questions be posed to
19 WSDOT regarding changes to the ITS system made through Addendum 16. There is no
20 evidence that Flatiron transmitted the questions to WSDOT. There is no evidence that Mr.
21 Shimizu's email had anything to do with sign structure forward compatibility requirements.
22

23 19. Flatiron delivered its proposal to WSDOT on December 19, 2011. On
24 January 26, 2012, WSDOT revealed bid results. The project was awarded to Flatiron.
25

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C. Design Phase Facts

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2 1. Although KPFF was responsible for sign structure design during the proposal
3 effort, URS assumed responsibility for design of the sign structures at the start of the design
4 phase. Yuhe Yang was the structural engineer employed by URS to design the structures.

5
6 2. In April of 2012 Yuhe Yang requested that URS roadway engineer Mr.
7 Mudayankavil review and verify the information contained within the sign structure matrix
8 before Mr. Yang began to design the sign structures. Mr. Yang also requested that new cross-
9 sections be generated by URS roadway engineers for use in designing the sign structures.
10 Transpo provided no sign structure dimensional information to URS other than the sign
11 structure length and height estimates provided in the pre-bid sign structure matrix and cross-
12 sections.
13

14 3. Several times Mr. Yang asked Mr. Mudayankavil and other URS roadway
15 engineers to calculate sign structure dimensions independent from the estimates provided by
16 Transpo during the proposal effort. Mr. Yang indicated he would only rely on dimensional
17 information developed or verified by roadway engineers in designing the sign structures. It is
18 not a good engineering practice for structural engineers to utilize information provided by
19 traffic engineers for dimensioning sign structures without review and acceptance by the
20 roadway engineers, because design information such as location and elevation should come
21 from roadway engineers.
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23
24 4. The dimensions of a number of the signs shown in the structural drawings
25 prepared by Mr. Yang did not match the dimensions shown in the sign structure matrix. No
26 evidence was presented to explain why the sign structure dimensions utilized by Mr. Yang do
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1 not match the dimensions in the sign structure matrix. The evidence did not establish the
2 dimensions in the sign structure matrix were used to design the sign structures.

3 5. It is standard engineering practice, and a good engineering practice, on design-
4 build projects for any discipline utilizing information developed during the proposal effort to
5 verify the accuracy of the information before utilizing it. Good engineering practice required
6 URS to verify that the sign structure dimension estimates developed by Transpo during the
7 proposal effort satisfied all RFP requirements before utilizing the information to design sign
8 structures. URS failed to perform this good engineering practice. Had URS properly verified
9 the accuracy of the sign structure dimension estimates prepared by Transpo during the proposal
10 efforts before designing sign structures, it would likely have discovered the proposal effort
11 structure lengths did not meet forward compatibility requirements. Had URS verified the
12 dimensional information prior to designing the structures, none of the URS-claimed redesign
13 costs, nor any of the contractor-claimed reconstruction and rework costs, would have been
14 incurred.
15
16

17 6. The signing plans prepared by Transpo did not show the details of the sign
18 structures. Details such as dimensions, shaft lengths, foundation type, etc., were shown on the
19 sign structure structural plans. Transpo did show sign foundation offsets in its signing plans
20 because it was directed to include the information by URS, specifically Mindy Steckmest. At a
21 meeting attended by a representative of Flatiron, Garth Merrill and Mindy Steckmest, Ms.
22 Steckmest directed Mr. Merrill to show offsets in the signing plan. The direction was given
23 because the structural plans were not in profile view, the signing plans were in profile view and
24 the contractor wanted to see the offsets in profile view. Transpo relied upon information
25 provided by URS in identifying offset locations. Transpo did not calculate or determine
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offsets. Cassidy Grillon, a roadway engineer employed by URS, maintained toll gantry and sign structure spreadsheets showing gantry foundation offsets. Transpo obtained the offset information it included in its signing plans either from URS's sign structural plans or from the spreadsheets maintained by URS. Good engineering practice required URS to verify that the offset information it maintained satisfied all RFP requirements. URS failed to perform that good engineering practice. It was reasonable for Transpo to rely on the offset information it obtained from URS and included on its signing plans, and good engineering practices did not require Transpo to verify the offset information.

D. Discovery of Forward Compatibility Dimensional Errors

1. In March of 2013, WSDOT issued comments regarding a series of signing plans, questioning whether the sign structure offsets shown on the signing plans met forward compatibility requirements. Shortly thereafter, in a meeting among Mr. Merrill, Mr. Haldors, Ms. Steckmest and others, Mr. Haldors stated in response to the assertion that offsets shown on Transpo's signing plans did not meet forward compatibility requirements, "We screwed up." There is no evidence any investigation into how the error occurred had been conducted at the time the statement was made. The evidence presented at trial established the offsets shown in Transpo's drawings were calculated by URS, not Transpo.

2. URS roadway engineer Chase Hendrickson generated new cross-sections for all of the sign structure locations on or about April 1, 2013. These cross-sections identified with a "drop down line" the forward compatibility roadway limits so forward compatibility compliance of the sign structure could be evaluated. Hendrickson spent 17 hours generating the forward compatible cross-sections at a total raw cost of \$589.56. Raw cost is cost before applying a multiplier for overhead and profit. Transpo engineer Jeremy Chin later incorporated

1 Hendrickson's cross-sections into a forward compatibility report. The Hendrickson cross-
2 sections showed Mr. Chin's name as the designer, although Mr. Chin testified that he did not
3 prepare the cross-sections, and that his name had auto-populated on the bottom of each drawing
4 because he had printed them.

5 3. Transpo engineers worked diligently to correct the errors after the problem was
6 discovered.
7

8 **E. Damages.**

9 1. Three sign structure drawings were released for construction in December of
10 2012. The structures shown in the drawings were the only sign structures with respect to which
11 construction had begun before the forward compatibility errors were discovered. Metal
12 fabrication had begun on the structures shown on structural plans ST83, 86 and 89. Foundation
13 construction had begun for the structures shown on Sheets ST83 and ST89. Foundations for
14 the sign structures were located by the contractor using survey data based upon cut sheets
15 provide to it by URS roadway engineers, not the signing plans. The contractor costs claimed
16 with respect to these structures, including access costs and inefficiencies, total \$338,873.72
17 (ST83 = \$119,366.18; ST86 = \$77,852.84; ST83, 86 & 89 rework = \$141,654.70). (See Ex.
18 75.)
19
20

21 2. Structural redesign of all structures that did not meet forward compatibility
22 requirements was performed by Bruce Erickson of KPFF. URS records (Ex. 74) reflect that
23 Mr. Erickson and other KPFF employees spent a total of 502.75 hours redesigning sign
24 structures, at a raw total cost of \$6,796.04. All remaining costs claimed as redesign costs relate
25 to project management and administrative expenses.
26
27
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1 3. URS offered only an estimate of anticipated costs to support its damages claim.
2 Actual costs were available for part of the structure on drawing ST1 and part of the structure on
3 drawing ST89. Actual costs were available for the complete structures shown on sheets ST 20
4 and ST 53. However, no actual cost information was offered into evidence.

5 4. The Flatiron and subcontractor damages sought to be recovered by URS relate to
6 17 structures shown on structural drawings labeled ST1, ST12, ST15, ST19, ST20, ST30,
7 ST49, ST51, ST53, ST59, ST79, ST83 ST85, ST86, ST89, ST90 and ST91. The Flatiron and
8 subcontractor damages claimed include costs for overhead and profit (both subcontractor
9 markup at 10% and Flatiron markup on subcontractor costs and markup of another 10%),
10 inefficiency costs, increased labor costs, additional mobilization costs, coordination costs,
11 overtime costs and administrative and supervisory costs. (*See, e.g.*, Ex. A-28.)
12

13 5. The contractor damages sought to be recovered by URS include additional steel
14 costs for added structure lengths totaling 162.5 feet (from Ex. 75: ST12 (19.5 feet); ST15 (20.0
15 feet); ST19 (20.0 feet); ST59 (19.0 feet); ST83 (14.0 feet); ST85 (3.0 feet); ST86 (26.0 feet);
16 ST89 (14.0 feet); ST91 (16.0 feet)). The most expensive per-foot cost for sign structure beams
17 was \$1,117, established in Ex. A-25. Therefore, the extra steel costs claimed totaled no more
18 than \$181,512.20.
19

20 6. The damage estimate summary offered into evidence by URS, and subsequently
21 admitted, is an outdated estimate. It includes costs not likely associated with forward
22 compatibility modifications to the sign structures, including costs associated with a boulder
23 obstruction at ST85 that would not have been discovered even if forward compatibility
24 dimensions had been provided; costs associated with water in foundation holes that should have
25 been accounted for in the original bid; additional costs claimed for night work that may or may
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1 not be associated with forward compatibility changes; additional costs for surface casings/
2 culverts not associated with the forward compatibility changes; and force account labor and
3 equipment time that should have been included in subcontractors original estimates.

4 **V. CONCLUSIONS OF LAW**

5 The Court's jurisdiction in this action is based on diversity of citizenship. Under *Erie*
6 *R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), "federal courts sitting
7 in diversity jurisdiction apply state substantive law and federal procedural law." *Gasperini v.*
8 *Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996).
9 Therefore, Washington's substantive law applies to URS's claims against Transpo.
10

11 After reviewing the evidentiary record, considering the legal authorities submitted, and
12 the argument made by the respective parties, the Court makes the following Conclusions of
13 Law:
14

15 **Jurisdiction and Venue**

16 1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because
17 the parties are citizens of different states and the amount in controversy exceeds \$75,000.
18

19 2. Venue is proper in the United States District Court for the Western District of
20 Washington pursuant to 28 U.S.C. § 1391(b)(2) because the events or omissions giving rise to
21 this lawsuit occurred in this judicial district.

22 **Breach of Contract**

23 1. URS has failed to establish by a preponderance of the evidence that Transpo
24 breached a contract provision and/or caused URS damage.
25
26
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1 2. URS failed to prove by a preponderance of the evidence that Transpo owed any
2 contractual duty to dimension sign structures or locate sign structures other than by station
3 along the roadway.

4 3. URS has failed to establish by a preponderance of the evidence that Transpo
5 breached any contractual duty during the proposal effort. Transpo undertook to perform
6 specific tasks relating to estimating sign structure lengths and elevations based upon cross-
7 sections provided by URS. Transpo had a right to rely and did rely on the accuracy and
8 completeness of URS-provided cross-sections in estimating sign structure lengths and
9 elevations.
10

11 4. URS has failed to establish by a preponderance of the evidence that Transpo had
12 been delegated responsibility during the proposal effort for assessing conditions that would
13 impact sign structure dimensions other than conditions shown in cross-sections provided to it
14 by URS. URS has failed to establish by a preponderance of the evidence that Transpo owed
15 any contractual duty to assess conditions that would impact sign structure lengths or heights
16 other than conditions shown in the cross-sections provided to it by URS.
17
18

19 5. URS has failed to establish by a preponderance of the evidence that Transpo
20 owed any contractual duty to verify URS's cross-sections met forward compatibility
21 requirements.
22

23 6. URS has failed to establish by a preponderance of the evidence that Transpo
24 breached any contractual duty during the design phase of the Project.

25 7. Transpo was contractually entitled to rely on the offset information provided to
26 it by URS, which Transpo included in its signing plans. URS has failed to establish by a
27
28

1 preponderance of the evidence that Transpo owed any contractual duty to verify the accuracy of
2 offset information received from URS before it included the information in its signing plans.

3 8. URS has failed to establish by a preponderance of the evidence that the scope of
4 Transpo's contractual duties to perform "signing" design included responsibility for designing
5 or dimensioning sign structures.
6

7 **Negligence**

8 1. URS has failed to establish by a preponderance of the evidence that Transpo
9 negligently performed services under its contract with URS.

10 2. Expert witness Carl Zietz was not qualified to establish the standard of care of a
11 signing engineer.
12

13 3. URS has failed to establish by a preponderance of the evidence that Transpo
14 owed any common law duty to dimension sign structures or locate sign structures other than by
15 station along the roadway.

16 4. URS has failed to establish by a preponderance of the evidence that Transpo
17 owed any common law duty during the proposal effort to assess conditions that would impact
18 sign structure lengths or heights other than the conditions shown in the cross-sections provided
19 to it by URS.
20

21 5. URS has failed to establish by a preponderance of the evidence that Transpo
22 breached any common law duty during the proposal effort.
23

24 6. URS has failed to establish by a preponderance of the evidence that Transpo
25 owed any common law duty to verify that URS's cross-sections met forward compatibility
26 requirements or that the sign structures it sketched into the cross-sections met forward
27 compatibility or other requirements not shown in the cross-sections.
28

1 7. URS has failed to establish by a preponderance of the evidence that Transpo
2 breached any common law duty during the design phase of the Project.

3 **Indemnity**

4 1. Based upon the Findings of Fact and Conclusions of Law set forth herein,
5 Transpo owes no duty to defend, indemnify or hold URS harmless against Flatiron's claims.
6

7 2. Further, URS's indemnity claim has not accrued because no damages have been
8 paid by URS.

9 **Comparative Fault**

10 1. The evidence does not support a finding of fault against Transpo for the
11 damages at issue in this matter.
12

13 2. Having found that Transpo is not liable for any damages claimed by URS, and
14 having previously dismissed Transpo's Counterclaim seeking an Order apportioning fault
15 amongst the parties, the Court makes no further findings with respect to fault.

16 **Damages**

17 1. Even if the Court had found Transpo liable in this matter, URS has failed to
18 present sufficient evidence for any damages as a result of the forward compatibility
19 dimensional errors. Further, URS failed to present sufficient evidence to afford a reasonable
20 basis for estimating its loss. Therefore, the necessary elements for applying the reasonable
21 certainty rule applicable to proof of damages have not been satisfied.
22

23 2. URS has failed to demonstrate by a preponderance of the evidence that
24 Flatiron's damages summary accurately reflects only costs associated with the forward
25 compatibility dimensional errors.

26 3. Having determined that Transpo is not liable for any damages in this action, the
27 Court does not reach the question of whether all damages sought by URS are indirect,
28

1 incidental, special or consequential damages barred by contractual waivers of damages
2 provisions.

3 **VI. CONCLUSION**

4 Having entered the above Findings of Fact and Conclusions of Law, the Court hereby
5 finds in favor of Transpo and against URS on all claims. This matter is now CLOSED.
6

7 DATED this 19th day of June 2015.

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9 RICARDO S. MARTINEZ
10 UNITED STATES DISTRICT JUDGE
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